92-1716

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

THE STATE OF TEXAS,

Petitioner,

v.

EDWARD ELDON CORLEY,

Respondent.

Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
For The State Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Texas Court of Criminal Appeals err by vacating the respondent's capital murder conviction because psychiatric testimony was erroneously admitted, without considering whether the admission of that testimony was harmless error in light of overwhelming and cumulative evidence including the respondent's confession?

PARTIES TO THIS PROCEEDING

The names of the parties to this proceeding are as follows:

1. Jack Skeen, Jr., Criminal District Attorney, Smith County, Texas; Amy R. Blalock, Assistant Criminal District Attorney, Smith County, Texas, 403 Smith County Courthouse, Tyler, Texas 75702 (Petitioner)

2. Edward Eldon Corley, Texas Department of Criminal Justice, Institutional Division, Ellis I Unit, Huntsville, Texas 77343 (Respondent)

3. Hon. Kenneth Crow, Moody & Crow, 204 North Sixth Street, Waco, Texas 76701-1397; Hon. James Knowles, 315 East Fifth, Tyler, Texas 75701 (Attorneys for Respondent)

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No. _____

In The

Supreme Court of the United States

October Term, 1992

THE STATE OF TEXAS,

Petitioner,

v.

EDWARD ELDON CORLEY,

Respondent.

Petition For Writ Of Certiorari To The Court Of Criminal Appeals For The State Of Texas

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals for the State of Texas entered in this proceeding on December 5, 1992.

OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas are reprinted in the appendix to this petition.

STATEMENT OF JURISDICTION

The opinion and judgment of the Texas Court of Criminal Appeals were entered on December 5, 1992. A timely motion for rehearing of that decision was overruled on January 27, 1993. The decision to deny rehearing is reprinted in the appendix to this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a). This petition is timely filed pursuant to United States Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Fifth Amendment provision that "no person shall be compelled in any criminal case to be a witness against himself", which applies to Texas through the Fourteenth Amendment, is involved in this case. Also, the Sixth Amendment provision that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense", which applies to Texas through the Fourteenth Amendment, is implicated in this case.

STATEMENT OF THE CASE

A. Statement of the Facts

The evidence in this case revealed that Vicki Morris was a twenty-year-old woman who had recently married her college sweetheart (SF 2322). On September 14, 1974, Vicki was practicing the hymn "The Old Rugged Cross"

on the organ at the Hebron Baptist Church. The respondent, who had noticed Vicki driving to the church earlier that day, observed her car in the parking lot (SF 2389). He entered the church and forced Vicki to leave with him.

The respondent drove Vicki to a remote, rural location. At some point, he taped her wrists. Using a Kabar knife, the respondent forced Vicki to take off her clothes (SF 2422). He then raped her (SF 2422). As she was putting on her clothes, he shot her in the head at point blank range with a .410 shotgun/.22 rifle ("over and under"). He then shot her again (SF 2421-2423). The gun was placed so close to her head that powder burns penetrated all the way through her skull (SF 2329, 2330, 2333).

A church member who came to the church at approximately 6:00 p.m. found Vicki's car in the parking lot and the organ on (SF 2055-2056). The key to the church was laying on the organ bench (SF 2056). One of Vicki's shoes was found by the organ bench, along with her jacket (SF 2055). The hymnal was found opened to the hymn "The Old Rugged Cross" (SF 2056). Vicki's partially clothed body was found the next morning in a pine cove by sheriff's deputies (SF 2082).

The respondent did not turn himself in to authorities. Immediately after the murder, however, the respondent flagged down two men to assist him with his truck, which was stuck in mud near Vicki's dead body (SF 2219). These men provided a description to police (SF 2222). They also identified the respondent at the trial (SF 2220, 2228). One of the witnesses testified that the respondent was wearing rubber boots when they helped him with his truck (SF 2230). Tire prints were found near

Vicki's body. These matched the tire prints found at the Hebron Baptist Church (SF 2092, 2137). Testimony revealed that these tracks could have been left by the respondent's truck (SF 2063). The tread of the respondent's truck tires was unusual (SF 2092).

Two sets of footprints were found near the location of Vicki's body. One of the sets was the print of rubber boots (SF 2093). The other set of footprints was much smaller. These prints were of a shoe and a bare foot (SF 2093). As noted earlier, one of Vicki's shoes was left in the church.

The respondent was found and arrested on September 17, 1974 (SF 2232). The arresting officer found a shotgun, a knife, and a pair of rubber boots in the respondent's truck (SF 2234, 2236). Louie L. Anderson, Dallas County Criminal Investigation Laboratory Firearms Deputy Examiner and Chemist, testified that the .410 Remington shotgun shells found near Vicki's body were fired from the shotgun found in the respondent's truck when he was arrested (SF 2188, 2234). Soon after he was arrested, the respondent wrote and signed a written confession which was admitted into evidence at trial (SF 2387).[1]

On September 18, 1974, the respondent was taken to the office of Dr. Tynus McNeel, a medical doctor and licensed psychiatrist practicing in Tyler, Texas (SF 2701).[2]

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[1] Weeks later, he executed a second confession, which was also admitted into evidence (SF 2420).

[2] At the time of his testimony, Dr. McNeel had been in practice for over 11 years (SF 2701). Dr. McNeel's professional qualifications include an undergraduate degree from the University of Texas; a medical degree from the University of Texas

The purpose of the interview was to ensure that the respondent understood and could comprehend his rights in connection with his confession, and also to gauge his sanity (SF Writ Hearing 95). The respondent voluntarily participated in the initial interview with Dr. Tynus McNeel (SF Writ Hearing 60, 102, 107).[3] Dr. McNeel testified that the respondent said that he had personal reasons for agreeing to this examination and that the respondent wanted to find out for himself why he had done the things he had done (i.e., commit the killing) (SF Writ Hearing 60). These statements made by the respondent

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Medical School in Galveston; a year's internship in Florida; a three year residency training in psychiatry at the University of Texas Medical School at John Sealy Hospital in Galveston; a membership in the Texas Medical Association; a membership in the American Psychiatric Association; and Board Certification as a Specialist in psychiatry from the American Specialty Board of Psychiatry (SF 2701-2702).

[3] Before Dr. McNeel interviewed the respondent, he advised the respondent of his rights. Dr. McNeel advised the respondent of his right to remain silent (SF 2706-2707). Dr. McNeel testified that the respondent understood that right (SF 2706). Dr. McNeel also told the respondent that anything the respondent said could be reviewed by and used against him by the District Attorney's office, because he was interviewing him at the request of the District Attorney's office (SF 2707). At the time of his interview with Dr. McNeel, the respondent did not have an attorney (SF Writ Hearing 9). At no time during the interview did the respondent request an attorney. Dr. McNeel may have addressed the respondent's right to have an attorney advise him (SF 2708). At the time of the interview with Dr. McNeel, the respondent had not been formally charged with or indicted for the murder of Vicki Morris (SF Writ Hearing 105).

were also included in Dr. McNeel's report made at the time of the interview.[4]

On October 10, 1975, the respondent was interviewed by Dr. James Grigson (SF 2732).[5] The respondent's attorneys were not advised of this interview (SF Writ Hearing 6, 15). Dr. Grigson did not give any *Miranda* warnings to the respondent before commencing the interview (SF Writ Hearing 28).

The respondent escaped from the Smith County Jail awaiting his trial (SF 2343, 2344). He was captured the day after he escaped (SF 2347). He was later tried for the capital murder of Vicki Morris. Included in the evidence presented to the jury were the two confessions written by the respondent. Both Drs. McNeel and Grigson testified

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[4] Although Dr. McNeel later briefly interviewed the respondent on two other occasions, he testified that he gained "essentially all the information" from the initial interview (SF Writ Hearing 57). His opinion was formed during the initial interview and the subsequent interviews merely confirmed his findings (SF 2718).

[5] At the time of his testimony, Dr. Grigson had been in private practice for approximately 8-1/2 to 9 years (SF 2729). Dr. Grigson's professional qualifications include a medical degree from Southwestern Medical School; a year's internship at Baylor Medical Center; a three year psychiatric residency training divided between Timberlawn Hospital and Parkland Hospital in Dallas; and 4-1/2 years teaching at Southwestern Medical School in Dallas. Dr. Grigson also served as a consultant at various times to (1) Terrell State Hospital (2 years); (2) Texas Woman's University Health Center (2 years); and (3) the Dallas County Health Department (3 years). Dr. Grigson is certified by the American Board of Neurology and Psychiatry (SF 2728-2729).

during the guilt/innocence phase of the trial.[6] The jury convicted him (SF 2820).

During the punishment phase of the trial, nine witnesses testified that the respondent's reputation as a peaceful and law abiding citizen was bad (SF 2839, 2841, 2843, 2845, 2846, 2848, 2849, 2854, 2856, 2857, 2859). Evidence of a prior conviction, burglary with intent to commit rape, was admitted (SF 2838, 2902). Both doctors testified that the respondent would be a danger in the future (SF 2864, 2876). The jury answered "yes" to both of the two special issues required by Article 37.071 of the Texas Code of Criminal Procedure, and the trial court assessed the mandatory death penalty.

B. Course of Proceedings and Disposition in the Courts Below

The Texas Court of Criminal Appeals affirmed the death sentence in 1979 (attached). This Court denied certiorari. The Texas Court of Criminal Appeals subsequently reversed the respondent's conviction in *Corley v. State*, No. 71,464 (slip op.) (December 2, 1992) (attached). The State filed a motion for rehearing, which was denied on January 27, 1993 (attached). Under the laws of Texas, the entire case must be retried.

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[6] The doctors were rebuttal witnesses for the state. The respondent presented evidence which indicated he was not mentally capable of understanding the *Miranda* warnings he received before he confessed. Dr. McNeel and Dr. Grigson testified that the respondent was, in fact, capable of understanding his rights (SF 2713, 2740). This was the only issue which the doctors addressed in the guilt/innocence phase of the trial.

REASONS FOR GRANTING THE WRIT

The Texas Court of Criminal Appeals reversed the death sentence of the respondent for the brutal rape and murder of Vicki Lynn Morris because the Court determined that the testimony of Dr. Tynus McNeel and Dr. James Grigson should not have been admitted during the guilt/innocence and punishment phases of the trial. The doctors interviewed the respondent before the trial started. Both doctors testified during the guilt/innocence phase of the trial and the punishment phase of the trial. Their testimony in the punishment phase of the trial addressed the respondent's potential for future dangerousness.[7]

This decision warrants review by this Court. In arriving at this conclusion, the Texas Court of Criminal Appeals did not consider whether the admission of the psychiatric testimony was harmless error. This Court has held that psychiatric testimony erroneously admitted during a capital murder trial may be considered harmless error, yet the Texas Court of Criminal Appeals ignored the harmless error doctrine of *Chapman v. California*, 386 U.S. 18 (1967) and *Satterwhite v. Texas*, 486 U.S. 249 (1988).[8] Unless this Court grants review and reverses the Texas Court of Criminal Appeals,

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[7] One of the special issues in TEX.CODE CRIM.PROC.ANN. art. 37.071, § 2(b)(1), is whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society".

[8] In past decisions, this Court construed its harmless error standard to mean that if the evidence in the trial was overwhelming or cumulative, the error committed was "harmless" and the conviction would be upheld. *Rose v. Clark*, 478 U.S. 570 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Milton v. Wainwright*, 407 U.S. 371 (1972); *Schneble v. Florida*, 405 U.S. 427 (1972). This Court recognized that the purpose behind the harmless error rule was the promotion

the State must retry a nineteen-year-old capital murder case in which the defendant confessed.

THE TEXAS COURT OF CRIMINAL APPEALS FAILED TO CONSIDER WHETHER THE PSYCHIATRIC TESTIMONY ON FUTURE DANGEROUSNESS WAS HARMLESS ERROR UNDER *SATTERWHITE V. TEXAS.*

This Court has determined that the harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in *Estelle v. Smith,* 451 U.S. 454 (1991), and has observed that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected the capital sentencing jury. *Satterwhite v. Texas, supra* at 1798. The harmless error rule is that if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, then the error is harmless and the verdict may stand. *Chapman v. California, supra* at 828.[9] Thus, the

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of economic and judicial efficiency. As this Court noted in the *Van Arsdall* decision:

> "The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Supra* at 681.

[9] In *Satterwhite,* this Court shifted its emphasis of harmless error from examining the error in the context of the weight of properly admitted evidence, back to the scope and impact of the erroneously admitted evidence. This is a significant departure, because it requires the State to prove a negative – that the error did not irreparably taint the proceedings. This Court did not overrule its

question in this case is whether the State has proved beyond a reasonable doubt that the doctors' testimony did not contribute to the verdict. The Texas Court of Criminal Appeals did not address this issue, but the State can show beyond a reasonable doubt that the psychiatric testimony did not contribute to the verdict; thus, no reversal is necessary in this case.[10]

The evidence properly admitted during the trial renders the admission of the psychiatric evidence "harmless error".

In addition to the evidence that was presented to the jury in the penalty phase, the jury is allowed to take into consideration all the evidence submitted, including the evidence in the guilt stage, in determining what penalty to assess against the respondent. *Pyles v. State*, 755 S.W.2d 98 (Tex. Crim. App. 1988). Texas law certainly does not require the admission of psychiatric testimony in a capital murder trial.[11] The circumstances of the offense, if severe

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previous decisions which permitted the courts to examine the error in the context of the other evidence, nor did it provide any real guidelines for fleshing out this new standard. In fact, *Satterwhite* stands out as an aberration and an anomaly to this Court's other opinions on harmless error.

[10] The Texas Court of Criminal Appeals' opinion cited federal cases and the opinion did not clearly state that it was relying exclusively on state law. Thus, it must be presumed that the opinion rested on federal law. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

[11] Psychiatric testimony is not essential to support an affirmative answer to the question of future dangerousness. *Carter v. State*, 717 S.W.2d 60 (Tex. Crim. App. 1986); *Mitchell v. State*, 650

enough, can be sufficient for an affirmative answer to the question of future dangerousness. *Landry v. State,* 706 S.W.2d 105 (Tex. Crim. App. 1985); *Holloway v. State,* 691 S.W.2d 608 (Tex. Crim. App. 1984). In fact, the facts and circumstances surrounding a murder may be more probative than any other evidence regarding the issue of future dangerousness presented at the penalty phase of the trial. *Kunkle v. State,* 771 S.W.2d 435 (Tex. Crim. App. 1986).

At the punishment stage of the trial, prosecutors asked the jury to consider all the evidence admitted during the guilt/innocence stage of the trial. Indeed, a plethora of evidence was presented during the guilt/innocence phase of the trial which is more than sufficient to support the jury's findings and verdict. Further, the evidence properly admitted during both phases of the trial was so overwhelming and cumulative that, beyond a reasonable doubt, the tainted testimony, which in contrast is rather insignificant, did not contribute to the jury's verdict.

As the State argued at trial, this murder and rape were particularly brutal and callous. The evidence revealed that the respondent kidnapped Vicki Lynn Morris as she was practicing the organ at her church. He forcibly raped the young newlywed. After he talked to her for a while and she begged him to spare her, he put a shotgun to her face and pulled the trigger. He fired once more to ensure that she was dead. The jury was allowed to hear several witnesses testify about the nature and

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S.W.2d 801 (Tex. Crim. App. 1983); *Williams v. State,* 668 S.W.2d 692, 695 (Tex. Crim. App. 1983).

extent of the offense and they were also permitted to see pictures of Vicki's violated and battered body. The jury also heard the respondent's two confessions. The obvious impact of this devastating and critical testimony should not be ignored. The State contends that this evidence deserves the Court's attention and should not be summarily dismissed.[12]

The jury most likely did not place great significance on the testimony of the psychiatrists. The State did not emphasize this testimony and the defense did an exhaustive job of discrediting Dr. Grigson in their closing statement. A juror from the 1975 trial testified in the writ hearing in 1992 that the testimony of the psychiatrists played no role in the jury's deliberations and that, absent the testimony of the doctors, the verdict would have been the same (SF Writ Hearing 91, 93).[13] The jury must have wondered why this innocent victim, a young newlywed, was forcibly taken from her church, violated by rape, and

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[12] Omitted from the Texas Court of Criminal Appeals' analysis is the idea that a criminal trial is a process that is designed to produce a reliable and fair result. The fairness of a trial is not impaired by a constitutional error that had no effect on the finding of guilt. See *Strickland v. Washington*, 466 U.S. 668 (1984). Also lost in the Texas Court of Criminal Appeals' analysis is the concern for public respect of the criminal appellate process, which was expressed by this Court in the *Van Arsdall* decision.

[13] This juror described the facts of the case as "a nightmare" (SF Writ Hearing 89). This juror could not recall any testimony of the psychiatrists (SF Writ Hearing 90). While calling one of the original jurors to testify was an unusual move, her testimony indicates that the psychiatric evidence played an insignificant role in the outcome of the trial. This is the best evidence presented by either side on the issue of "harmless error".

killed by the hands of a stranger in a horrifying manner. This was a brutal crime inflicted upon an unsuspecting young woman; it is likely that the jury never concerned itself with the doctors' testimony and based their verdict on the fact that the respondent subjected this innocent victim to such suffering.

Considering the overwhelming evidence, forcing the State to retry this entire nineteen-year-old case for a mistake which was not considered improper at the time of the trial is unreasonable. The cost of this retrial will no doubt be exorbitantly expensive and extensively taxing on the financial resources of this county.[14] Another factor which has been overlooked is that any retrial will be excruciatingly difficult for the family of Vicki Morris. Her family will be forced to relive her horrifying last hours and the pain and indignity that she endured. Such a result is not fair, nor just, and it is certainly not necessary.

This case is distinguishable from *Satterwhite v. Texas*.

In *Satterwhite*, this Court held that the admission of the psychiatric testimony was not harmless error in the trial of Satterwhite's case. Many differences exist between respondent's case and *Satterwhite*, however. One fact which distinguishes this case from *Satterwhite* is the closing argument by prosecutors. The prosecutors in Satterwhite unduly emphasized Dr. Grigson's testimony, and

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[14] This is a nineteen-year-old murder case. Witnesses have died or disappeared. Evidence will have to be reconstructed. The retrial of this case will be incredibly time-consuming and expensive for this small county.

repeated the word "sociopath" several times during the argument. The prosecutors in the present case emphasized the facts of the crime. During the guilt/innocence phase, the State simply made a passing reference to both psychiatrists. During the opening portion of the State's summation, the prosecutor referred to the "two psychiatrists for the State" (SF 2773). In the closing part of the State's summation, the prosecutor again mentioned both psychiatrists in tandem: "You heard Dr. Grigson, and you heard Dr. McNeel" (SF 2814).

There are more references to Dr. Grigson during the punishment phase of the trial, but Dr. Grigson did not feature as prominently as he did in *Satterwhite*. The prosecutor mentioned Dr. Grigson four times and Dr. McNeel was mentioned once (SF 2907-2908, 2940). The defense spent a good portion of their closing statement attempting to thoroughly discredit Dr. Grigson (SF 2913-2920; 2925-2926). The State did not respond to the statements by the defense in their rebuttal argument; the prosecutor only mentioned Dr. Grigson once during the rebuttal (SF 2940). The State did not attribute great weight to the psychiatric testimony. The prosecutors did not emphasize or rely upon this testimony.

Further, the brutal sexual assault of Vicki Morris distinguishes it from the *Satterwhite* case and is alone indicative of future dangerousness. No rape occurred in the *Satterwhite* case. Despite the cold calculation with which Satterwhite murdered his victim, the lack of a sexual assault is significant. The jury found the respondent guilty of this heinous crime. While the State produced mental health experts to testify, this was not necessary to sustain a conviction.

Since the facts of this case alone would have been sufficient to support an affirmative answer to the second issue if the doctors had not testified, it can hardly be said that this evidence added anything to the jury's decision. A psychiatrist is not required to determine that a person who would kidnap a young woman out of a church, take her to a remote location and sexually violate her, point a loaded shotgun at her head and pull the trigger and then fire the shotgun at her head a second time, is a deviant who should be removed from civilized society.

By disregarding this critical evidence as if the sexual assault did not happen or did not matter, the Texas Court of Criminal Appeals not only ignored the federal harmless error standard but it also callously disregarded the pain and suffering endured by Vicki Morris and her family. In light of the fact that the respondent *confessed* to this horrible crime, it is difficult for the State and Vicki Morris's family to understand why this case must be retried. If the mental health testimony is subtracted from the sum total of evidence presented to the jury, there was still ample and compelling evidence properly admitted that can sustain the verdict reached in this case. Because of all the evidence the jury heard, both in the guilt and penalty phases, this Court should consider the decision by the Texas Court of Criminal Appeals in light of the harmless error standard and determine that the State proved beyond a reasonable doubt that the erroneous admission of the mental health testimony did not contribute to the verdict of death. The sentence of death should be affirmed.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted in this case. The judgment of the Texas Court of Criminal Appeals should be reversed and the case should be remanded to that court, for further proceedings.

Respectfully submitted,

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APPENDIX 1

Edward Eldon CORLEY, Appellant,

v.

The STATE of Texas, Appellee.

No. 58703.

Court of Criminal Appeals of Texas,
En Banc.

Feb. 21, 1979.

Rehearing Denied April 25, 1979.

Defendant was convicted in the 54th Judicial District Court, McLennan County, Carl C. Anderson, J., of capital murder, and defendant appealed. The Court of Criminal Appeals, Douglas, J., held that: (1) insanity jury instruction in competency proceedings did not deny defendant due process; (2) it was not abuse of discretion to deny motion for continuance on ground that defense needed time to examine 218 pages of material written by defendant in jail and given to defense two days prior to beginning of voir dire, and (3) capital punishment procedure was constitutional.

Affirmed.

Odom, J., dissented and filed opinion in which Roberts, Phillips and Clinton, JJ., joined.

James Knowles, Mike A. Hatchell, Tyler, Kenneth H. Crow, Waco, for appellant.

A. D. Clark, III, Dist. Atty. and William Saban, Asst. Dist. Atty., Tyler, for the State.

Before the Court en banc.

OPINION

DOUGLAS, Judge.

Edward Eldon Corley appeals his conviction for capital murder. The jury returned affirmative findings to special issues concerning whether Corley acted deliberately and whether he would commit further acts of violence. The court assessed his punishment at death.

Vicki Lynn Morris was abducted from the Hebron Baptist Church in Tyler in the late afternoon as she played "The Old Rugged Cross" on the church organ. The following morning her body was found about four miles from the church. She had been shot with a 410 gauge shotgun and she had been raped. Three days after her abduction, appellant was arrested by the sheriff of Panola County. The murder weapon was found in appellant's pickup truck. After he was taken to Smith County he confessed to killing Vicki Lynn Morris. Later he confessed to raping her prior to the murder.

A hearing on appellant's competency to stand trial was held in Smith County. Then venue was changed to McLennan County.

Corley contends the trial court committed error at the pre-trial competency hearing by submitting to the jury a definition of competency to stand trial that was fundamentally erroneous and a denial of due process. Prior to trial appellant filed a motion for a hearing to determine his competency to stand trial. A jury was impaneled, heard the evidence and received a charge which contained the following standard for determining appellant's competence:

> "To establish insanity at the present time it must be established by a preponderance of the evidence that the defendant is laboring under such mental disease or defect of the mind as to be rendered incompetent to make a rational defense to the charges against him."

Prior to the submission of the charge, appellant requested that the following language be substituted:

> "To establish insanity at the present time, it must be established by a preponderance of the evidence that the defendant does not, by reason of metal disease or defect, have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and that he does not have a rational or factual understanding of the proceedings against him. In this regard, you are instructed that the term mental defect may include mental retardation."

Corley argues that the standard submitted in the charge was constitutionally impermissible.

A review of the relevant United States Supreme Court cases is necessary. In *Bishop v. United States,* 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956), the Court held that conviction of a mentally incompetent individual violates the due process clause. *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), which dealt with a federal prosecution, held that the standard which required only that a defendant be "oriented to time and place and [have] some recollection of events" was inadequate. *Dusky* required that the standard, in federal prosecutions, be that the defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a

rational as well as factual understanding of the proceedings against him." *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), attempts to "resolve the difficult question of state-federal relations" posed by *Bishop* and *Dusky*. The *Pate* court first applied the *Bishop* rule to the states and further held that state procedures must be adequate to insure that an incompetent individual is not tried. Finally, in *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the Court held that because there was sufficient evidence raised at the state trial concerning the defendant's incompetence due process was denied by the state's failure to conduct a hearing into the defendant's competency. The Supreme Court has never held that the standard set forth in *Dusky* was constitutionally mandated as the only standard under which a state can determine an individual's competency.

The relationship between the federal and state courts concerning the standard for determining insanity at the time of the offense presents an interesting parallel. The federal courts have long expressed dissatisfaction with the M'Naghten Rule for determining insanity. While most American jurisdictions have rejected this outmoded test, the federal courts have not held that it is constitutionally forbidden. *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952); *Corley v. Cardwell*, 544 F.2d 349 (9th Cir. 1976) cert. denied 429 U.S. 1048, 97 S.Ct. 757, 50 L.Ed.2d 763 (1977).

The Supreme Court has recognized the difficulty of constitutionally requiring a specific standard when dealing with psychiatric-legal principles. In *Leland*, Mr. Justice Clark wrote:

> "The science of psychiatry has made tremendous strides since the test was laid down in M'Naghten's case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law. * * * In these circumstances it is clear that adoption of the irresistible impulse test is not 'implicit in the concept of ordered liberty.' "

Similarly, Mr. Justice Marshall, writing for the plurality in *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), stated:

> "This definitional confusion reflects, of course, not merely the undeveloped state of the psychiatric art but also the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions * * * It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers."

The Supreme Court has held that an incompetent individual cannot be tried and that a state's procedures must be adequate to ensure that this does not happen. The Court has also held constitutionally adequate a standard which tests (1) whether an individual understands the charge against him and (2) whether he can communicate with his attorney.

In the instant case the court submitted the issue of appellant's competency to the jury. He submitted a definition of present insanity under which appellant must be able "to make a rational defense to the charges against

him." If appellant could not understand the charges against him he would not be able "to make a rational defense to the charges against him." Similarly, if he could not communicate with his attorney, he would not be able "to make a rational defense to the charges against him." The charge given by the court was broad enough to comply with *Dusky*. The charge provided adequate procedural safeguards to ensure that an incompetent individual would not be convicted. We hold that the charge given in this case did not deny appellant due process.

In *Ex parte Long*, 564 S.W.2d 760 (Tex.Cr.App.1978), relied upon by the dissent, the main fault with the charge was that it gave the "right and wrong" test as a basis of his competency to stand trial. The court instructed the jury as follows:

> " . . . 'inability at the time of this trial of the defendant to understand the difference between right and wrong, or inability in mind to understand and appreciate the nature of the act charged against him in the indictment and the consequence thereof, or inability of the defendant in mind to make a rational defense concerning said act or offense.' "

The trial court required the jury in effect to find that the defendant did not understand the difference between right and wrong and as a result thereof he could not make a rational defense to the act or offense. The right and wrong test was not in the instruction to the jury in the present case.

Corley next contends that his confessions were inadmissible for numerous reasons. After his arrest at 7:30 a.m. on September 17, 1974, in Panola County, Corley was

taken before a Panola County magistrate. Corley was subsequently informed that his mother had obtained an attorney to represent him. However, Corley stated he did not want to talk to his mother or the attorney. He also declined to use the telephone on several occasions when he was offered an opportunity to use it. Appellant was taken before a second magistrate and again warned. At 4:20 p.m. on the day of his arrest he signed a confession.

The attorney hired by appellant's mother testified that he was hired only to represent Corley at the time of the arrest. He also stated that he was never prevented from seeing Corley.

On November 1, 1974, the district attorney went to see Corley in response to a letter from Corley stating he had other things to tell him. At this time Corley added additional facts to his original confession.

Corley was indigent during the time he was held in jail. Counsel was appointed for him after he gave the second confession.

Appellant argues that the confessions were inadmissible because he did not have an attorney to explain his rights to him and he had a per se right to appointment of counsel within a reasonable time after his arrest. There is no per se right to counsel prior to taking a confession. *Woodkins v. State,* 542 S.W.2d 855 (Tex.Cr.App. 1976). Appellant did not request an attorney when he was taken before the magistrates and informed of his right to an attorney. He made no request to anyone in the jail for an attorney. Under these circumstances there was no error in the State's failure to provide him with an attorney.

Appellant also contends that because he was "retarded" he did not possess sufficient mental capacity to make a knowing, intelligent and voluntary waiver of his rights. Four expert witnesses testified concerning appellant's mental capacity. The experts disagreed over whether or not appellant was retarded although there was a consensus that his IQ was in the low 70's. The defense experts testified that Corley was not able to understand the warnings given to him prior to his making the confessions. The prosecution experts testified that he was able to understand the warnings. The finder of facts resolved this conflict against appellant. We cannot substitute our judgment concerning the credibility of the witnesses. We hold that the trial court had sufficient evidence before it to conclude that there was a voluntary and intelligent waiver by appellant of his rights before he confessed.

Complaint is next made of the following written response made by the court to the jury's request for the testimony of the psychologists and psychiatrists:

> "With reference to your requests, you are instructed that the Law does not permit a general rereading of the testimony of any witness or witnesses, and in this connection, you are instructed that the Law in this regard provides as follows:
>
> " 'In the trial of any criminal case in any District Court of this State, if the Jury disagrees as to the statement of any witness, they may, upon applying to the Court, have read to them from the Court Reporter's notes that part of such witnesses' testimony on the particular point in dispute, and no other.' Unless the Jury

> has disagreed upon some part of the testimony under the above law, you are not entitled to have any of the testimony reread, but, if you have disagreed upon any point or points in the testimony, and you will so state to the Court in writing, and point out in writing the point or points upon which you have disagreed, then the Court will have the Court Reporter read back to you only the testimony on the point or points in dispute and no other, as best as such testimony can be selected from the recorded testimony. In the event you should state to the Court that you have disagreed as to the testimony of the witness or witnesses referred to above on any point or points and request that the testimony be read back on any point or points, you are instructed that the Court Reporter will need sufficient time to examine all of the testimony of the witness or witnesses in order to get all of the testimony on the point or points concerning your inquiry, and it will take the Court Reporter as long to read the testimony back as it did to put it on, and in the event you ask for such testimony the Court will request you to be patient and allow sufficient time for this to be done in order for you to get the matters you have requested."

The record does not reflect any objection to this response.

Article 36.14, V.A.C.C.P., requires a written objection to a charge before this Court can review the error. There was no effort made to comply with that provision. Reviewing the charge as a whole, it is an accurate statement of the law and facts and is not improper.

Appellant's next group of contentions concerns 218 pages of material written by him in jail. This material was in the custody of the State but was given to the defense

on October 20, 1975 – two days prior to the beginning of voir dire. Appellant filed a motion for continuance so that he could examine this material. That motion was denied. At the motion for new trial hearing, appellant alleged that the prosecutor committed misconduct by suppressing this material. He introduced the 218 pages into the record.

Corley urges that the denial of the continuance and the motion for new trial was improper. The material was written by appellant while in jail. He was fully aware of it. There was no specific request for this material. It was not signed by appellant. It was not introduced into evidence. It had no relevance, except insofar as it might relate to his mental condition, on the issues in the trial.

Consideration of a motion for continuance is vested in the sound discretion of the trial judge. *Ewing v. State,* 549 S.W.2d 392 (Tex.Cr.App.1977); *Chance v. State,* 528 S.W.2d 605 (Tex.Cr.App.1975). There was no abuse of discretion shown. Since appellant was aware of the written material he cannot claim that the prosecutor suppressed it. *Means v. State,* 429 S.W.2d 490 (Tex.Cr.App.1968). See *Ogle v. State,* 548 S.W.2d 360 (Tex.Cr.App.1976). No prosecutorial misconduct is shown.

Corley next contends that the court should have instructed the jury not to consider the oral testimony which laid the predicate for exhibits which ultimately were not admitted into evidence. Curtis Owen, the Smith County District Attorney, gave testimony that laid a predicate for the introduction of two letters from Corley to

Owen. When the State sought to have these letters admitted, the jury was removed and appellant made several lengthy objections, all of which were overruled. The State then withdrew their offer of the exhibits. Appellant made a motion that the jury be instructed to disregard Owen's oral testimony concerning the exhibits. The court overruled the objection because it was not made at the time the testimony was given.

There was no objection made by appellant at the time Owen was testifying. Appellant's objection did not occur until after all of Owen's testimony. Under these circumstances, nothing is presented for review.

Finally, appellant contends that his motion to quash the indictment should have been granted because our capital punishment procedure is constitutionally impermissible. He argues that the trial court has too much discretion in accepting evidence, that a mandatory death sentence is required, that the second special issue submitted to the jury is vague, that our law constitutes a bill of attainder and that the allegation of "committing and attempting to commit aggravated rape" is duplicitous and repugnant.

We have rejected these arguments before. Our capital punishment procedure is constitutional. *Jurek v. State*, 522 S.W.2d 934 (Tex.Cr.App.1975), affirmed 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929. Appellant's contention that the indictment is duplicitous and repugnant has also been rejected. In *Jurek*, we upheld an indictment that alleged "in the course of committing and attempting to commit kidnapping of and forcible rape." Corley's objections to the indictment are overruled.

By way of post-submission brief, appellant also contends that admission of his oral confession through the testimony of Dr. Tynus McNeel was error. He complains of the following:

> " . . . However, I do think, from reading some of his writings, that he would be able to read and understand this material [the confession], certainly, for the most part. What I particularly think is important, if I might, is, that this information is essentially the information that was told me by Mr. Corley. So, I feel rather confident in having the opinion that he was aware of this information, and aware of the nature of it, because it was discussed in some detail with me. I stated a while ago, that I was familiar with the story on these papers. And I am familiar with it, from a first hand account of it with him."

Appellant did not object to this testimony. He did not raise it in his brief filed with the trial court.

Statements made by an accused during a psychiatric examination to determine his competency to stand trial are inadmissible. Article 46.02, V.A.C.C.P. In the instant case, appellant's confessions were before the jury. McNeel's testimony did not add any new factual statements made by Corley. The testimony was cumulative. Appellant did not object on any grounds.

The failure to object amounts to a waiver of even constitutional grounds. *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *Francis v. Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). See *Boulware v. State,* 542 S.W.2d 677 (Tex.Cr.App.1976).

There is no reversible error. The judgment is affirmed.

ODOM, Judge, dissenting.

I dissent to the majority's disposition of appellant's tenth ground of error in which he contends the trial court committed error at the pre-trial competency hearing by submitting to the jury a definition of competency to stand trial that was fundamentally erroneous and a denial of due process. Error at a pre-trial competency hearing may now be raised on appeal from the subsequent conviction. *Jackson v. State*, Tex.Cr.App., 548 S.W.2d 685.

Before trial appellant filed a motion for a pre-trial hearing to determine his competency to stand trial. A jury was impaneled to decide the issue and after evidence was heard the trial court instructed the jury to determine the issue by this standard:

> "To establish insanity at the present time it must be established by a preponderance of the evidence that the defendant is laboring under such mental disease or defect of the mind as to be rendered incompetent to make a rational defense to the charges against him."

Before this charge was submitted to the jury appellant requested a charge with this definition:

> "To establish insanity at the present time, it must be established by a preponderance of the evidence that the defendant does not, by reason of mental disease or defect, have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and that he does not have a rational or factual

> understanding of the proceedings against him. In this regard, you are instructed that the term mental defect may include mental retardation."

It is well settled that the definition of competency encompasses a two-part test. That test as set out in *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as a factual understanding of the proceedings against him." That standard was subsequently applied by the United States Supreme Court in *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), and in *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). The *Dusky* test has been recognized by this Court in numerous cases. *Ex parte Hagans*, Tex.Cr.App., 558 S.W.2d 457; *Aimsworth v. State*, Tex.Cr.App., 493 S.W.2d 517; *Sandlin v. State*, Tex.Cr.App., 477 S.W.2d 870.

The trial court's deviation from the *Dusky* standard was fatal in this case. Although the charge given by the judge in the instant case did not use the M'Naghten rule, as has been held improper for determining competency, it did use an instruction similar to a part of the instruction given in *Ex parte Long*, 564 S.W.2d 760 (Tex.Cr.App., En Banc, 1978). There the trial judge instructed the jury that the standard to use to determine the competency of the accused was:

> "Inability at the time of this trial of the defendant to understand the difference between right or wrong, *or* inability in mind to understand and appreciate the nature of the act charged against him in the indictment and the

> consequence thereof, *or* inability of the defendant in mind to make a rational defense concerning said act or offense." (Emphasis added).[1]

The third of the alternatives submitted in that charge was substantially the same as the standard submitted in this case. The last part of that charge measured competency by the ability of the accused "to make a rational defense concerning said act or offense," while the present charge similarly instructed the jury that the standard of incompetency was whether or not the accused had the ability "to make a rational defense to the charges against him." The jury charge on the competency issue in this case was as fully deficient with respect to the constitutional requirements of *Dusky* as was the one in *Long*. To instruct the jury that they must find whether the defendant was mentally competent to rationally prepare a defense leaves the jury to speculate as to what legal test is properly applicable. Such a test falls far short of what is required by *Dusky*, supra.

Since the issue of the appellant's competency to stand trial was decided under a standard which did not

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[1] The Court in *Long* held that the charge was based upon the M'Naghten standard and the application of such a standard constituted a violation of due process because it measured the competency to stand trial by a standard other than that set forth in *Dusky*. The majority do not adequately distinguish the charge used in *Long* from the one submitted in this case. The charge in *Long* was in the alternative and included the terms used in this case. In fact, the charge in *Long* was more protective of the defendant than the one here, in that one of the alternative standards in that charge was whether the accused could understand and appreciate the nature of the act charged against him in the indictment. Yet, even that was held insufficient.

afford him due process of law, the appellant is entitled to a determination of such issue under the proper standards. Furthermore, inasmuch as appellant pointed out the defect in the trial court's charge by adequate request for a proper instruction, he is also entitled to reversal on state grounds for the trial error in overruling that request. Under state law, appellant was entitled to a more precise instruction to the jury on the standard to determine competency than the conclusionary "rendered incompetent to make a rational defense to the charges against him."

It is also transparently clear that the majority have devalued the constitutional basis of the *Dusky* test in their effort to analogize the competency issue with the issue of insanity at the time of the offense. These two matters will not support the bridge the majority have attempted to erect between them. There is no established constitutional right to the insanity defense, whereas the right to a fair competency determination is of established constitutional magnitude. It is from this very difference that the insanity defense cases quoted by the majority carry no weight in deciding the issue in this case.

The insanity defense cases exhibit flexibility on the matter of standards, yet no such flexibility characterizes the competency issue. Inasmuch as the insanity defense springs from the inexact if not inconsistent realms of the behavioral sciences, it is to be expected that the standards experimented with on that issue should exhibit considerable difficulties whenever a rigid formulation of the issue is attempted. This is partly because that issue encompasses ethical and legal considerations that reach beyond any fact determination by behavioral scientists. See,

Graham v. State, Tex.Cr.App., 566 S.W.2d 941; *United States v. Brawner*, 153 U.S.App.D.C. 1, 471 F.2d 969.

The test for competency to stand trial, on the other hand, is a matter of federal constitutional right, is uniform throughout the land, is not beset with inconsistencies, and speaks to the heart of the matter: does the accused have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and does he have a rational as well as factual understanding of the proceedings against him.

In this case appellant specifically requested a charge in the language of the constitutionally mandated standard. The majority, by approving a test that asks whether the accused was rendered "incompetent to make a rational defense to the charge against him," have deprived appellant of a fair determination of the competency issue. In this case, the jury, as the fact finder for the competency issue, was given no guidance on what standard to apply. Without any elaboration on what constitutes incompetence, they were instructed to decide whether he was incompetent. The purpose of a jury charge is to instruct the jury on the law. Without guidance on the law the jury cannot do its job. It received no guidance here, and therefore no fair determination of appellant's competency to stand trial was made. Appellant specifically requested a proper charge on the issue. The trial court committed reversible error under state law when it denied appellant's requested charge, and it committed reversible error under federal constitutional law when it submitted the erroneous instruction to the jury. The majority are wrong on both state and federal grounds and the judgment should be reversed.

I dissent.

ROBERTS, PHILLIPS and CLINTON, JJ., join this dissent.

APPENDIX 2

EX PARTE EDWARD ELDON CORLEY
Habeas Corpus Application

NO. 71,464 From MCLENNAN County

OPINION

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P. Applicant, Edward Eldon Corley, presented one allegation in which he challenged the validity of his conviction and resulting sentence. On June 24, 1992, we ordered the cause filed and set for submission on the following ground: that the introduction of the testimony of two psychiatrists at the punishment phase of applicant's trial violated his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The trial court was directed to make findings of fact and conclusions of law with respect to applicant's allegations. The trial court recommended relief be granted.

SUMMARY OF PERTINENT FACTS

In November of 1975, applicant was convicted of capital murder under V.T.C.A. Penal Code, §19.03, in McLennan County, after a change of venue from Smith County. The indictment alleged the offense was committed on September 14, 1974. The jury returned affirmative answers to the special issues submitted according to Article 37.071, V.A.C.C.P., resulting in the assessment of a death sentence. This Court affirmed the judgment and

sentence on direct appeal. *Corley v. State*, 582 S.W.2d 815 (Tex.Cr.App. 1979).

Applicant was examined by psychiatrists Dr. James Grigson and Dr. Tynus McNeel while in pre-trial custody. At the time of the first interview with Dr. McNeel, on September 18, 1974, applicant was not represented by an attorney. In November of 1974, applicant was appointed counsel and a co-counsel was appointed at a later date. Applicant was later interviewed in April and October of 1975, however, his counsel were not notified of these interviews. At the time the interviews were conducted, applicant was not told that his statements could be used against him at the punishment phase of his trial. The testimony of both doctors at the punishment phase was entered into evidence over defense objections.

FIFTH AMENDMENT VIOLATION

Applicant argues that the introduction of the testimony of Dr. Grigson and Dr. McNeel at the punishment phase of his trial violated his privilege against self-incrimination and his rights to due process of law. In *Smith v. Estelle*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), the Supreme Court held that the failure to inform a defendant that what he said during the competency examination could be used against him at the punishment phase of trial on the issue of future dangerousness violated the defendant's Fifth Amendment rights. *Smith*, 101 S.Ct. at 1874-1876; See also *Wilkins v. State*, ___ S.W.2d ___ (Tex.Cr.App., No. 70,135, delivered June 10, 1992).

In *Smith*, the trial judge ordered a psychiatric examination of the defendant by Dr. James P. Grigson to determine the defendant's competency to stand trial. Dr. Grigson did not inform the defendant before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at the punishment phase of his trial. Despite his failure to so inform defendant Smith, Dr. Grigson was called to the stand at the punishment phase where he testified that Smith "is a very severe sociopath." Dr. Grigson was the State's only witness at the punishment phase. The jury returned three affirmative answers to the requisite questions, and Smith was sentenced to death. The court found that Smith's statements to Dr. Grigson could be used at the punishment phase only if he had been informed of his rights and had knowingly decided to waive them. Since the defendant was not afforded those safeguards, the Supreme Court found that his death sentence could not stand. *Id.*

In *Wilkins*, appellant's counsel requested the trial court appoint an expert to examine the defendant concerning his competency to stand trial, which the trial court granted, eventually appointing two psychiatrists. The doctors, McNeel and Allen, were the only witnesses to testify for the State at the punishment phase. This Court in *Wilkins* held that "the State cannot use an expert who has examined the defendant for sanity and competency to testify to future dangerousness on the basis of that examination absent a defendant's waiver of his Fifth Amendment privilege at the punishment phase." *Wilkins v. State*, slip op. at 3.

The facts in this case are similar to those in *Smith* and *Wilkins*. On the request of the District Attorney of Smith County, the applicant, Corley, was subjected to repeated examinations by Dr. McNeel and Dr. Grigson. On September 18, 1974, applicant was interviewed by Dr. McNeel, who stated that the purpose of the examination was for evaluating applicant's "mental capacity and mental competence." Although applicant was warned of his right to remain silent, he was not warned by Dr. McNeel that his statements could also be used as evidence against him at the punishment phase of his trial or to form the basis for predictions of future dangerousness. Dr. McNeel again examined applicant on April 2, 1975 and on October 16, 1975. At neither of these subsequent interviews was applicant informed that the interviews would be used to try to obtain the death sentence. On October 10, 1975, Dr. Grigson conducted a psychiatric examination of applicant lasting approximately one hour. Applicant was not warned before his interview with Dr. Grigson of his right to remain silent or that his statements could be used at the punishment phase of his trial or for predictions of future dangerousness.

Dr. Grigson and Dr. McNeel testified at the punishment phase of applicant's trial on the issue of applicant's future dangerousness. Dr. McNeel testified that applicant showed strong signs of sociopathic type personality disorder, that there was no treatment for this disorder, and that there was a probability that he would commit violent crimes that would constitute a continuing threat to society.

Dr. Grigson testified that (a) applicant is a severe sociopath; (b) applicant is as severe a sociopath as can be

found; (c) there is no treatment for his condition; (d) Dr. Grigson unequivocally stated that he was 100% sure that applicant would commit future crimes; (e) applicant will continue to do what he has done in the past, the numbers will just get worse; (f) applicant is a continuing threat to society; (g) Dr. Grigson compared applicant to a malignant cancer on society that had to be destroyed.

Both Dr. Grigson and Dr. McNeel drew their conclusions in part from the statements made by applicant during their psychiatric examinations and the State argued the testimony of both doctors during punishment. Applicant did not voluntarily consent to the pretrial psychiatric investigation for purposes of assessment of future dangerousness. Therefore, applicant's Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony and Dr. McNeel's testimony at the punishment phase.

SIXTH AMENDMENT

Applicant further argues that the introduction of the testimony of Dr. Grigson and Dr. McNeel at the punishment phase of his trial violated his right to effective assistance of counsel. The Sixth Amendment guarantees an accused that he need not stand alone against the State at any stage of the prosecution "formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226-227, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149 (1967). The need for assistance by counsel in the pretrial stage has long been established. *Powell v. Alabama*, 287 U.S. 45, 57, 71, 53 S.Ct.55, 60,65,77 L.ed. 158

(1932). In *Smith,* the court found that defendant's Sixth Amendment right to counsel had attached when Dr. Grigson examined the defendant at the county jail. *Smith,* 101 S.Ct. at 1877. Just as occurred herein, the defense counsel were not notified in advance that the psychiatric examinations would include the matter of their client's future dangerousness.

In this case, applicant had not been appointed counsel at the time of his first examination by Dr. McNeel on September 18, 1974. Once engaged, neither of applicant's appointed attorneys were notified in advance of the psychiatric examination conducted by the doctors which occurred subsequent to their appointments. Thus, under *Smith,* the testimony by Dr. McNeel and Dr. Grigson at the punishment phase was admitted in violation of applicant's Sixth Amendment right to the assistance of counsel.

Applicant's Fifth and Sixth Amendment rights were abridged by the State's introduction of the testimony of Dr. Grigson and Dr. McNeel at the punishment phase of his trial; accordingly, his death sentence is vacated. Applicant is remanded to the custody of the Sheriff of Smith County to answer the indictment.

OVERSTREET, JUDGE

(Delivered December 2, 1992)
En Banc
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354TH DISTRICT COURT-75-291-CA

Tyler Case No. 71,464
STYLE: COREY, EX PARTE EDWARD EI DON

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
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